IV.

A CONFUTATION OF A Late PAPER;

BIBLIOTHECA BODLEIANA

ENTITULED,

AN ANSWER TO THE Lords Proteſtation. IN A LETTER to a GENTLEMAN.

SIR,

I Have Received Yours, where you tell me, *You are highly ſatisfy'd, that the Lords did only what they ought to have done, in Rejecting the Impeachment of Mr.* Fitz-Harris; And this you have Gathered out of a Little Paper your Nephew ſent you, Entituled, *An Anſwer to the Lords Proteſtation.* Now Sir, to Undeceive You as well as many others, on whom 'tis like that Paper might prevail, I have written this following Diſcourſe, where I ſhall not undertake to Stripe every Word or Sentence, but only Confute thoſe more conſiderable Arguments, by which the Author would have us think, He hath not only proved it lawful for the Lords to Reject, but almoſt unlawful for them to Receive the Impeachment.

In the firſt Place he ſays, *The Parliament is the moſt High Court of the Nation; and then, 'tis Rational to think, That any Crime whatſoever doth not fall under the Cogniſance of it.*

That the Parliament is the Higheſt Court of the Nation is very true; And 'tis as true, That the Commons have right to Impeach any Subject for Treaſons or Crimes whatſoever, that concern the King or Kingdom; 'Tis not to be ſuppoſed, That by theſe words *any Crimes*, the Proteſtation means *all Crimes*, ſuch as *Felonies*, *Treſpaſſes*, *Aſſault* and *Battery*, which indeed fall not under the Cogniſance of Parliament, but ſuch only that Concern the Kingdom, as this of *Fitz-Harris* doth, and for which Impeachments are uſually brought, ſo that this is a Crime that concerned the whole Nation; It did Entitle the whole Nation to a proſecution of it, and then for the Lords to hinder this Suit, was certainly a Denial of Juſtice to the whole Nation.

But if this ſhould be admitted, in a ſhort time the Juriſdiction of other Courts

would fall to the Ground, and it may be supposed, the Lords would think it necessary to have Perpetual Parliaments for determining Crimes of the lowest Nature.

Very well, Sir, that because the Lords Assert a Right in the *House of Commons* of Impeaching for any Crimes that Concern the Kingdom, that they do also Assert, That all Offences that lie at the Suits of particular Persons should also be Tried by Way of Impeachment; so that by our Authors Inference one would think, that the Lords Protestation did mean, That none should be burned in the Hand or Whipp'd, but such as were Impeach'd by Parliament; Which is as far from the meaning of those Noble Lords, as our Author is from Truth and Ingenuity, in saying, That they would think it necessary to have continual Parliaments for the determining all Crimes, because they would have an Impeachment prosecuted according to the usual Practice of Parliament.

But if this be a valid Reason against the Lords for Rejecting the Impeachment; it infers a Right of Trying all Treasons in Parliament, because they Influence the Parliament, and are best determined in Parliament.

No, I think not, it only infers a Right of Trying such Treasons in Parliament as ought there to be Tried, such as shall lie under an Impeachment, not such as are by Way of Indictment, which the very Protestation proves; for the Reason why the Lords Protested, was not because it was a Treason, but because it was prosecuted by those that could do it no where but in Parliament; And to stop Prosecution there did quite incapacitate them of prosecuting; And if stopping of all Prosecution be not a denial of Justice to the Parties prosecuting, I do not know what is.

If there were any force in this Argument, the Right of Trying High Treasons was never understood before this time, for there have been Traitors Tried out of Parliament.

Sure our Authors Intellectuals at the Compiling this Work were indispos'd with some *Vertigo*, otherwise he could not have so Egregiously mistaken the Sense of the Protesting Lords, as to think that by their Protestation they did mean, That the right Way of Trying Treasons was only in Parliament; Whereas it is clear from what they did, that they did only mean such Offences are to be Tried in Parliament as are Prosecuted by the Commons, that can do it no where else.

By Magna Charta *no Man is to be Condemned but by lawful Judgement of his Peers.*

So that to Try a Commoner in Parliament, when the Lords are not his Peers, is contrary to *Magna Charta*, and highly unlawful; Indeed, if *Magna Charta* did say just as he doth it would be so; But *Magna Charta* not only says, That no Man shall be Condemned but by lawful Judgement of his Peers, but it also says *Or by the Law of the Land*; So that there may be a lawful Trial of a Commoner, and according to *Magna Charta*, and not by his Peers, the Disjunctive proves; and that the Law of impeachment is the Law of the Land, and not contrary to *Magna Charta*; All must confess, when they consider how many there have been Tried of the Commons by way of Impeachment, since the making of *Magna Charta*, and not the least Objection made against the Lawfulness of the Proceeding, till our Authors Brains were delivered of this Brat; But pray mark the disingenuity of the Person, in endeavoring to impose on the World, by Mincing the Quotation, taking the words that serve

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for his Turn, *viz. By lawful Judgement of his Peers*, and leaving out the words, *By the Law of the Land*; As if these were not as much of *Magna Charta* as the former.

'Tis the Opinion of Lawyers, that Acts made against the Fundamental Laws, of which Trials by Peers is One, are in themselves void.

So that it seems the Powers that laid these Fundamentals were greater then the present Powers, else Acts now made would be binding; But where was that Power Lodged, either in the King by Himself, or in Him Joyn'd with his Parliament; Now 'tis impossible, that the King should have more Power without then he hath with his Parliament; And 'tis as irrational to say, That the King hath not as much Power now as in the time of *Henry* the Third, so that now there being as great Power in an Act of Parliament as ever, it clearly follows, That those Fundamentals may be altered.

'Tis dangerous and against the Liberty of English-men, *to Admit of Trials without* Juries; *Innocents may be Harangued to Death by their Prosecutors, and the vilest Criminals saved by the same means; Witnesses may Influence by Passionate Expressions to Contract or Dilate their Evidence.*

All this Amounts to a very high Reflection on the Parliament, intimating, That there is not as much Justice as in Trials by Juries, that there the Innocent are liable to be Harangued into a Halter, and Delinquents to be saved by Taking Orations; Then it seems the Lord *Stafford*'s Head was Harangued off his Shoulders; for his being a Peer doth not alter the usual Justice of the Court. Surely, if the People was as knowing as our Author, they would petition for an Act against Impeachments, it being as he saith, a Proceeding Attended with a great deal of Injustice and Partiality.

But if the Commons desire to Impeach a Commoner, may they do it? Yes, if the Lords are willing; for they are not Obliged to Pass Judgment on any against their Wills but their Peers, as 'tis Proved from the Case of Bereford, Gournay, *and Others. who in the* 4th. *of* Edward the Third, *had Judgment Pass'd on Them by the Lords. And afterwards it was Accorded by the King and all the Grands, That albeit the Peers as Judges of Parliament, took upon Them to make and render the said Judgment, yet that the Peers shall not for the future be bound to Render Judgment on any but their Peers.*

This Proviso *was made in full Parliament with these two Respects.*

1. *To satisfie the Commons that they intended not by their Judgment to Alter the Course of the Common Law, and therefore they declar'd against Power to do this, and Confess'd it was contrary to the Law of the Land.*

2. *To Preserve their own Rights to Judge none but their Peers, in Case of Life and Death.*

So then, this President is urged as an Argument to prove, That the Rejecting of the Impeachment was lawful; But let us consider whether the Case of *Bereford* and the rest be the same with the Case of *Fitz-Harris*; If it be, the Author hath surely overturn'd the Protestation; If it be not, it will no ways serve his turn, *Bereford* by the Command of the King was brought into Parliament, and there had Judgment at the Kings Suit, which by the Way was very Illegal; for all Indicted ought to be Tried by their Peers; *Fitz-Harris* was Impeached by the *Commons*, and at their Suit could be Tried no where but in Parliaments; And now that these two Cases are not the same is very clear; And if not the same, then our Author cannot from hence infer, That the Rejectment was lawful, for when a President is brought for a Proof,

the Preſident muſt always be the ſame with the thing that's to be proved; Now ſeeing the Caſe of *Bereford* and *Fitz-Harris* is not the ſame, it neceſſarily follows, that nothing can be inferr'd from the Caſe of *Bereford*, to the Caſe of *Fitz-Harris*; And indeed 'tis to me very ſtrange, That becauſe the Lords Accorded, that they would not be Obliged to try a Commoner, which ought to be Tried at the Common Law, our Author ſhould infer, That they are not likewiſe obliged to Try a Commoner, when he is proſecuted at that Suit that can be Tried no where but before the Lords in Parliament; This is to make an Indictment and Impeachment the ſame; And if ſo, then an Indictment may be found by the Commons in Parliament, and an Impeachment may be brought out of Parliament; To Aſſert which, would be the higheſt of Non-ſenſe; And indeed I ſhould ſuſpect that Man to be of a diſtempered Underſtanding that ſhould affirm it; 'Tis yet more apparent, this can no ways prejudice an Impeachment, for that was done to aſſure the Commons the Lords intended not to alter the Courſe of the Common Law; Thence it follows, That the Subject-matter of that Act was ſuch as ought to have been Tried at the Common Law, of which an Impeachment is no part; And conſequently, could not be concern'd in this Act of the Lords.

But it may be Preſumed, that if the Commons ſhould force an Impeachment on the Lords againſt a Commoner, that may be Tried at the Common Law, and Vote that it ought not to be Tried in an Inferiour Court, Men may be apt to think it is a deſign to delay Juſtice, or to get a Pardon.

Indeed I really think, that what induced the *Houſe of Commons* to this Impeachment was not a pure deſign of Proſecution, but becauſe they would create an Opportunity of making a farther Diſcovery of the Deſign *Fitz-Harris* was engag'd in; But let the Motive be what it will, the Proſecution is ſtill the ſame, the Impeachment alters not whether the Commons did it with a deſign of Proſecuting or Diſcovering; I ſhall paſs by the Statute he quotes, for it can no ways be applicable to our Buſineſs, becauſe it only lays down the manner of Proceeding on Trials out of Parliament.

But for the Lords to ſay, That an Impeachment and an Indictment are two different Suits is a meer Quibble; for whether this Criminals Trial be by Indictment or Impeachment 'tis the ſame Accuſation; namely for Treaſon; *And the Proſecution in both Courts (which is really and truly the Suit) is for the ſame End and Purpoſe, that is, the Puniſhment of the Delinquent.*

I am highly ſorry, to ſee a Man of great Knowledge and Underſtanding as the Reputed Author of this paper is ſaid to be, ſo ſtrangely Halt in his Intellectuals, as to Aſſert that there is no difference betwixt an Indictment and an Impeachment, becauſe they are both Accuſations, and both tend to the ſame End, namely, the Puniſhment of the Delinquent; So then, according to our Author, two Ways that lead to *London*, one of which comes from the North, and the other from the South, are not really two different Ways, becauſe they are both Ways, and both tend to the ſame End. Yet I believe, there is no Traveller, but would really think theſe Ways do plainly differ, notwithſtanding they are both Ways, and both lead to the ſame place; And I believe, there is no Lawyer but our Author, but thinks an Impeachment and an Indictment two different Suits, notwithſtanding they are both Accuſations, and both tend to the ſame thing, namely, the puniſhment of the Delinquent; for that that makes them differ, is not becauſe they are both Accuſations, and aim both at the ſame End, but becauſe the Parties proſecuting do it for different Reaſons,

one for Himself, the other for the King; And seeing to prosecute for the King and for ones self is not the same thing, it clearly follows, that an Indictment and an Impeachment do really differ; And if so, then what the Lords Asserted in their Protestation is not a meer Quibble.

But the Ground of the wonderful Reason is the different use of the two Words, Impeachment *and* Indictment, *both which signifie an Accusation, and the design of both is the same, and it matters not, whether Punishment be by the Lords or by the Judges at* Common Law, *but the most equal Way will be by his Peers, by whom he may have the most equal Condemnation or Acquittal, there being not the President that comes up to, or is parallel with this Case.*

That an Indictment and an Impeachment do both signifie an Accusation, is true; And 'tis as true, that they are different Accusations, for one is the Kings, and the other the Peoples; And seeing an Act of the King do really differ from that of the People, it follows, that an Indictment and an Impeachment are two different Suits; And indeed it had been no great matter, whether *Fitz-Harris* be Condemned in or out of Parliament, had not the Commons by their Impeachment Entitled themselves to his Prosecution, for by this Act they made it their Suit; And although the Delinquent may be punished elsewhere, yet this is no satisfaction to them, because not done at their Prosecution; So that the Reason why the Lords Protested, was not because they thought Trials in Parliament, purely Considered, more Legal then those out of Parliament, but because the Delinquent was now Prosecuted at the Suit of the Commons, who could do it no where but in Parliament, and to hinder Prosecution there, was to stop all Prosecution to them, which certainly is Injustice.

Indeed I must Concur with our Author, that Trials by Peers is most Legal out of Parliament; But if he means that 'tis the only Legal Way of Trying Commoners, I cannot be of his Opinion; for I believe Trials by Impeachment before the Lords, are as lawful and as just as Trials by Juries, and the Lords as tender in Giving Judgement, notwithstanding they are not upon Oath, as the Juries are, of their Verdicts; But what our Author means by these words, *There being not one President Parallel with this Case*, I cannot tell, if he means, *That there never was a Case Parallel with the Case of* Fitz-Harris, that is, *the Impeachment of a Commoner*; Be sure he hath Consulted no other History but *Tom Thumb* or *Guy of Warwick*, for every Kings Reign abounds with Examples of this Nature, and always thought both just and legal.

The Case of an Appeal, if rightly understood, signifies nothing, for who Sues an Appeal must Sue it in proper Person, and to make an Impeachment of the Commons the same with this Case, it must be made appear by Presidents out of the Parliament Rolls, or Journals, or by the Common or Statute Law, that the Commons have such an Action or Suit, as an Impeachment of a Commoner for Treason, which may be Tried in an Inferior Court, given them before the Lords, so as they cannot refuse to hear or judge it, or they do nothing.

That there is a great Parity betwixt an Appeal and an Impeachment no Man can rationally doubt, in that they are both at the Suit of the Party prosecuting, for an Impeachment is in the Name of the House of Commons, and all the Commoners of *England*; The Prosecution is by themselves for themselves, and in their own Names do they demand Judgement, which would be very unmannerly if the Suit was not their own; Now I cannot Conceive how it

it ſhould conſiſt either with Law or Reaſon, that they ſhould demand Judgement on a Perſon, if he was not proſecuted at their Suit, ſo that though it cannot be made appear, that the Commons have ſuch a Suit as an Impeachment of a Commoner for High Treaſon, which may be Tried in an Inferiour Court; yet 'tis clear that there is a great Similitude betwixt an Impeachment and an Appeal, in that they are both at the Suit of the Party, and then this inſtance of an Appeal will ſtand the Lords in ſome ſtead; for by this it appears, that the Offence for which *Fitz-Harris* is Accuſed, may be Proſecuted at two ſeveral Suits, One by the King out of Parliament, and another by the Commons in Parliament; ſo that there being two diſtinct Proſecutions of the ſame Offence, it follows alſo that there are two diſtinct Judgments, ſo that the Offence may be proſecuted and puniſhed at one Suit, yet this is no ſatisfaction to the other; And then *Fitz-Harris* may be Tried, Condemned and Hanged upon an Indictment; And yet this is no ſatisfaction to the Houſe of Commons, becauſe they had no intereſt in that Suit; and where they had no Intereſt, they cannot be ſaid to receive ſatisfaction.

So then, to what our Author and many more do ſay, who Plead up for the Lawfulneſs of Rejecting the Impeachment, that it is no denial of Juſtice to the Houſe of Commons to hinder their Proſecution, becauſe that very Offence which they would puniſh may be puniſhed elſewhere, is highly falſe, for the Puniſhment of it there doth nothing reſpect the Suit of the Commons, and then certainly there can be no ſatisfaction; And ſeeing the Law hath made two diſtinct Proſecutions of the ſame Offence, ſo that the proſecution at one Suit, is not the proſecution at the other; It doth alſo neceſſarily ſuppoſe, that there are two diſtinct Parties that may proſecute at their two diſtinct Suits, ſo that one proſecuting and receiving ſatisfaction, is no ſatisfaction to the other; for if it was, the Law would *Fruſtra agere*, in permitting two Suits when one would ſatisfie all, *Nam fruſtra fit per Plura, quod poſſit fieri per pauciora.*

Well, but it was no denial of Juſtice to deliver up Drake *to the Common Law, and therefore can be none to deliver up* Fitz-Harris.

Indeed I concur with our Author, that the Lords delivering up *Drake* to be proſecuted at the Common Law was no denial of Juſtice; yet that it was a denial of Juſtice to Reject this Impeachment, is clear for this Reaſon, for here the Commons required Juſtice, and in the firſt they did not, but let their Suit fall; And where the Commons do not require Juſtice, there the Lords cannot be ſaid to deny it; But on the contrary, when the Commons require the Proſecution of a Delinquent, then for the Lords to deny it, is without doubt a denial of Juſtice; So that the Denial of Juſtice doth not purely conſiſt in the Lords delivering over the Suit of the Commons, but their doing it when the Commons require Proſecution of it in Parliament; Then ſeeing in *Drake*'s Caſe, the Commons required not any proſecution, and in the Caſe of *Fitz-Harris* they did require it; it follows, that in the firſt Caſe it was not, and in the latter it was a denial of Juſtice for the Lords to throw out the Impeachment; Beſides, there is a great difference betwixt the not receiving an Impeachment, and the removing it when it was for ſome time Lodged; for in the latter Caſe the Suit is Revived, and if the Commons do not proſecute 'tis their fault, but in the firſt Caſe the Suit is abſolutely Rejected, which is the Act of the Lords; Then ſeeing there is ſo great a diſparity betwixt the Caſes of

Drake

Drake and *Fitz-Harris*, this inſtance will ſtand our Author in ſtead, for as I have already ſaid, He that quotes a Preſident for a Proof, muſt always prove the Preſident to be the ſame with the thing that's to be proved, for *A diſpari non valet Argumentum.*

Iha ve now done with our Author, I ſhall only add a word more, If the Commons have a right to Impeach, it follows, they have a right to proſecute; and this muſt be before the Lords, then ſure the Lords Rejecting their Suit was the denying them what was their right, and this certainly is a denial of Juſtice: But ſome ſay, *They have a Right if the Lords pleaſe*, ſo that this Right depends on the Will of the Lords; but this is falſe, for their Rights, of which Impeaching is one, are Founded on the Ancient Practice of Parliament, and not on the Will of the Lords; And ſeeing the Lords cannot alter the Practice of Parliament, where the Commons are concerned, without a breach of the Law of Parliaments, it more ſtrongly follows that this was Injuſtice. But 'tis Objected, *That if the Commons ſhould have this, they might Impeach the whole Nation, and ſo hinder the King of all Proſecution*; That the Houſe may Impeach all is poſſible, but that they will is highly improbable; But this cannot hinder the Kings Suit, for if the Commons do not proſecute in any reaſonable time, the Lords may upon Proclamation quit the Priſoner, who is ſtill liable to an Indictment.

SIR, I am

Your Humble Servant,
W. I.

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FINIS